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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
VOLUME II

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 86-1238

JOHN CHARLES LESKO,
Petitioner

v.

GLEN R. JEFFES, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional institution at Rockview; HENRY G. BARR, General Counsel of Pennsylvania; and LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,
Respondents

MEMORANDUM OPINION

BLOCH, District J.

Petitioner John Chales Lesko has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, setting forth numerous contentions of error arising out of his trial, con-

viction and sentence on charges of criminal homicide and criminal conspiracy in the Court of Common Pleas of Westmoreland County, Pennsylvania. The Court concludes that petitioner was deprived of his right to a fair trial guaranteed by the Fourteenth Amendment and, therefore, grants the writ.[1]

I. Facts

Early in the morning of January 3, 1980, Officer Leonard Miller was killed by two bullets fired from a .38 caliber revolver. His body was discovered by fellow police officers who had heard his radio message stating the he had been shot. Testimony at trial revealed that shortly before the shooting, Miller was observed in his patrol car in the parking

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[1]In light of this disposition of the matter, the Court finds it unnecessary to address the remaining issues raised by petitioner.

parking lot of a local convenience store. A Lancia sports car was observed repeatedly driving past the officer at a high rate of speed.

The primary Commonwealth witness at trial was Richard Rutherford, a juvenile who had been present with the petitioner and his co-defendant Michael Travaglia throughout the evening of January 2-3 1980. Rutherford testified that upon observing Officer Miller in his patrol car at the side of the road, Travaglia, the driver of the automobile in which the three men were riding, stated that he wanted to "have some fun with this cop." He then sped past the officer's car and beeped the horn. When the officer did not pursue the car, Travaglia turned around and sped past him again, at which point Miller gave chase. After a short time, Miller forced the car to the side of the road.

Travaglia rolled down the window on the driver's side of the car and, as Miller approached, fired two shots, at least one of which struck the officer. The officer returned fire, striking the passenger window of the automobile.

The statements of Travaglia and petitioner were introduced at trial. Travaglia maintained that he shot Miller accidentally when the hammer of the gun slipped and a shot was discharged. Petitioner stated that the purpose of speeding past Miller was to draw him away from the convenience store so that they later could return and rob it.

Rutherford gave additional testimony that, later the same day, Travaglia and petitioner met one Daniel Montgomery in downtown Pittsburgh at which time Travaglia gave Montgomery a .38 caliber revolver and stated that he had "shot a cop." The revolver later was recovered

from Montgomery; ballistics tests established that it was the weapon from which the shots which had killed Miller had been fired.

The Lancia automobile was recovered following the shooting and was identified as being registered in the name of William Nichols; Nichols' wallet was found in the car. The right passenger window had been shot out. Analysis of glass fragments retrieved from the areas where Miller's body was found revealed the fragments were of the same type as the glass in the windows of the Lancia automobile. A lead slug removed from the vehicle was identified by the Commonwealth's ballistics expert as having been fired from Miller's .357 magnum service revolver.

II. Procedural History

Petitioner was charged with first degree murder and criminal conspiracy to

commit murder in connection with the death of Officer Miller. Following lengthy jury selection proceedings, the trial in petitioner's case commenced January 21, 1981, in the Court of Common Pleas of Westmoreland County, Pennsylvania. Defendant was tried jointly with Michael Travaglia. The evidence presented at trial documented that Travaglia was the primary actor in the charged offense; the jury was instructed that petitioner could be found guilty of the murder of Officer Miller only as an accomplice. On January 30, 1981, a verdict of guilty of murder of the first degree and guilty of criminal conspiracy was returned against both defendants.

The sentencing phase of the trial immediately followed return of the jury's verdict; evidence was presented concerning aggravating and mitigating

circumstances pursuant to 42 Pa.C.S.A. § 9711. The jury determined that a sentence of death was appropriate as to both defendants.

Post-trial motions were filed by petitioner with the Court of Common Pleas of Westmoreland County, which motions were denied by order of April 5, 1982. On April 23, 1982, the Court of Common Pleas formally imposed a sentence of death upon petitioner.

Petitioner then filed an appeal from the judgment of conviction and sentence with the Pennsylvania Supreme Court. By order dated September 29, 1983, the Court affirmed the judgment of conviction. Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983). Reargument was denied on December 14, 1983.

On February 13, 1984, petitioner filed a petition for a writ of certiorari

with the United States Supreme Court. The writ was denied on June 18, 1984. Lesko v. Commonwealth, 467 U.S. 1256 (1984).

Having completed the remedies available to him on direct appeal, petitioner then filed a petition for post-conviction relief with the Court of Common Pleas of Westmoreland County, pursuant to the Pennsylvania Post-Conviction Hearing Act, 42 Pa.C.S.A. § 9541, et seq. The petition was denied on June 11, 1985. On July 10, 1985, petitioner filed an appeal from the order of June 11, 1985, with the Pennsylvania Supreme Court. In an order dated November 12, 1985, the Supreme Court affirmed the trial court's denial of post-conviction relief. Commonwealth v. Lesko, 509 Pa. 67, 501 A.2d 200 (1985). Rehearing was denied on April 2, 1986.

On May 31, 1986, petitioner filed a second petition for a writ of certiorari with the United States Supreme Court, which was denied on February 23, 1987. Commonwealth v. Lesko, ___ U.S. ___, 107 S.Ct. 1328 (1987).

The instant petition was filed with this Court on June 11, 1986. The following day, this Court granted petitioner's request for a stay of execution, having found that the petition for habeas corpus presented a substantial question on the merits, i.e., whether a jury instruction during the penalty phase of a capital case directing the jury not to be swayed by sympathy for the defendant violated the defendant's rights under the Eighth Amendment to the United States Constitution.

A substantially similar issue was pending review before the United States

Supreme Court in the case of California v. Brown, cert. granted, 476 U.S. 1157 (1986). Accordingly, the parties' obligation to address the merits of the habeas corpus petition was stayed pending the Supreme Court's decision in the Brown case, which was rendered January 27, 1987. ___ U.S. ___, 107 S.Ct. 837 (1987). Following the Brown decision, a briefing schedule was established. Briefs having been received, the case is ripe for disposition on its merits.

III. The Issue Presented

During the guilt phase of the trial, the Commonwealth introduced evidence, over petitioner's objection, of another homicide which he and Travaglia had committed on the same evening as the Miller homicide. Petitioner contends that the admission of this evidence deprived him of his right to a fair trial, guaranteed

by the Fourteenth Amendment. (Petition, pp. 25-33).

The evidence in question concerned the murder of William Nichols' the owner of the Lancia sports car. The facts of the Nichols' homicide were presented to the jury through the testimony of Richard Rutherford.

Rutherford's testimony was as follows. On the evening of January 2, 1980, Travaglia abducted Nichols from the Edison Hotel Bar in the City of Pittsburgh. In the company of petitioner and Rutherford, Travaglia forced Nichols to drive out of the City of Pittsburgh. Upon entering the car and before leaving the City, Travaglia produced a gun and shot Nichols in the arm. After traveling some distance, Nichols was handcuffed and placed in the back seat of the automobile. As the evening progressed, petitioner

repeatedly punched the wounded and bound man in the face with his fists, taunting him with a knife, calling him a "queer" and asking him if he wanted to perform deviate sexual acts. Travaglia, driving the automobile, would occasionally slow down to strike the victim. Nichols repeatedly pleaded with petitioner and his co-defendant to stop and asked what they intended to do to him.

Eventually Nichols slipped into unconsciousness. His scarf was cut in half and part of it stuffed into his mouth. The remaining part was tied around his head as a gag. Travaglia then stopped the car in a wooded area by a frozen lake. Nichols was dragged from the car, still handcuffed and with his feet bound. Travaglia and petitioner then dragged Nichols across the edge of the frozen lake to a hole which they had broken in the ice. Although Rutherford

testified that he did not see Nichols enter the water, he stated that, as they left the scene, Travaglia commented that Nichols came up one time, was coughing and then disappeared beneath the surface of the water.

Prior to the introduction of this evidence, petitioner's counsel moved to have the evidence excluded. Counsel argued that the evidence was irrelevant and could have no bearing upon any motive attributable to petitioner. This motion was denied. Counsel than requested that the court review the statements of Travaglia and petition prior to ruling on the admissibility of Rutherford's testimony, since the statements contained matters relating to motive. The court agreed to do so, and following review of the same, ruled that the evidence was relevant to the issues of motive and the defendants' state of mind

in that it tended to reduce the possibility that the Miller homicide was an accident and had a bearing upon the degree or homicide at issue. In addition, the trial judge ruled that the evidence of the Nichols' killing was admissible because it was an event closely related to the murder of Officer Miller, in that the two murders occurred within the space of three or four hours. Thus, the judge ruled, the two homicides could be seen as a single series of events.

Weighing the probative value of this evidence against its potential for prejudice, the trial judge determined that its tendency to counteract Travaglia's assertion that the killing of Officer Miller was a mistake outweighed whatever prejudice would be caused by its admission.

Petitioner's counsel moved that the testimony be limited to the fact that Nichols' car was stolen and that Nichols was killed, there being no need to present the lurid details of the killing to the jury. The motion was denied. Accordingly, Rutherford was permitted to testify, not simply to the fact of the Nichols' killing but also to the details surrounding Nichols' death, as set forth above.

The judge at this point in the trial did not instruct the jury regarding the limited purposes for which the evidence of the Nichols' homicide was being admitted. During his final charge, however, he did explain that the jury was not to consider this evidence for purposes other than establishing motive or rebutting the claim that the shooting of Officer Miller was accidental.

IV. Exhaustion

A habeas corpus petitioner must exhaust available state remedies before the federal court may entertain his petition for habeas corpus relief. Vasquez v. Hillery, 474 U.S. 254 (1986); Picard v. Connor, 404 U.S. 270 (1971); 28 U.S.C. § 2254(b) and (c). Principles of comity and deference underlie the exhaustion requirement, which assures that the state courts will have the first opportunity to address the habeas petitioner's claims, without interference from the federal judiciary. Wilwording v. Swenson, 404 U.S. 249 (1971); Fay v. Noia, 372 U.S. 391 (1963). In addition, there are practical reasons for requiring that federal issues first be presented to the state courts. The requirement "affords the parties the opportunity to develop the record necessary for adjudicating the issue [and] insures that if there are independent and ade-

quate state grounds that would permit the federal issue they will be identified and acted upon in an authoritative manner." Webb v. Webb, 451 U.S. 493, 500 (1981).

The Commonwealth states that the petitioner has satisfied the exhaustion requirement by presenting to the state courts the numerous claims contained in his petition at one point or another in the post-trial and appellate process. A concession by the state's counsel, however, is insufficient in itself to dispose of the exhaustion issue; rather, an "independent judicial inquiry" is required. Zicarelli v. Gray, 543 F.2d 466, 471 (3d Cir. 1976); see also Brown v. Fauver, 819 F.2d 395 (3d Cir. 1987).

The exhaustion requirement is satisfied once the federal claim has been "fairly presented" to the state courts. Picard v. Conno, 404 U.S. at 275. In

order to be fairly presented, the claim raised in the habeas proceeding must have rested upon the same legal and factual bases in the state court, Hill v. Zimmerman, 709 F.2d 232 (3d Cir.), cert. denied, 464 U.S. 940 (1983); that is, the same method of analysis must have been presented to the state and federal courts. Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir.), cert. denied, ___ U.S. _____, 108 S.Ct. 139 (1987); Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976).

On direct appeal from the judgment of conviction, the petitioner argued that the introduction of evidence of the Nichols' homicide was error justifying the grant of a new trial. The legal basis of this argument was not the Fourteenth Amendment's due process clause, however; the argument presented to the Pennsylvania courts rested upon prin-

ciples of state evidentiary law. The briefs presented to the state courts in post-conviction proceedings addressed the evidence of the Nichols' killing, but only in the context of an argument concerning the claimed failure of the Pennsylvania Supreme Court, on direct appeal, to give petitioner the proportionality review required by the Pennsylvania death penalty statute, 42 Pa.C.S.A. § 9711(h)(3)(iii). Due process issues were not raised. In short, while the state courts have been presented with an opportunity to address the prejudicial effect of the admission of the evidence, the issue has not been phrased in terms of due process concerns prior to the filing of the instant habeas petition.

Despite this fact, the requirements of exhaustion doctrine have been satisfied. Inasmuch as the legal standards

employed to evaluate a due process claim arising out of the admission of prior crimes evidence are essentially identical to those applied by the Pennsylvania Supreme Court in its evaluation of petitioner's claim on direct appeal, the purposes which exhaustion is designed to serve has been met. Due process analysis, when applied in the context of claimed error arising from evidentiary rulings, requires as assessment of the prejudicial effect of the evidence in the context of its probative value. See, e.g., Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981); United States ex rel Lowry v. Myers, 364 F.2d 297 (3d Cir. 1966). This process parallels the analysis employed the the Pennsylvania Supreme Court, in its evaluation of the evidentiary question at hand. Common-

wealth v. Travaglia, 502 Pa. 474, 467 A.2d 288, 296-98 (1983). Moreover, an argument that highly prejudicial evidence was erroneously admitted in effect subsumes the claim that a fair trial has been denied. It is unrealistic to assume that, had the issue been framed in terms of the process due a defendant under the Fourteenth Amendment rather than under state evidentiary law, the outcome of the Pennsylvania courts' analysis would have been different.

In addition, there are no "unresolved questions of fact or of state law" which would bear upon the issue presented.[2] Granberry v. Greer, ___ U.S

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[2]The question of prejudice under the Fourteenth Amendment is one of law and not of fact; therefore, the state courts' findings on this issue are not binding on this court. Brewer v. Williams, 430 U.S. 387 (1977); Panzavecchia v. Wainwright, 658 F.2d 337, 339 (5th Cir. 1981).

____, 107 S.Ct. 1671, 1675 (1987); Reynolds v. Ellingsworth, No. 86-5633, slip op. at 28, n.23 (3d Cir. March 31, 1988). No independent and adequate state grounds are presented which would eliminate the need to address petitioner's due process claim. Webb v. Webb, supra. Given the fact that this is a capital case and, therefore, a greater degree of scrutiny is appropriate, United States ex rel Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962), cert. denied, 374 U.S. 828 (1963), the merits of petitioner's argument will be addressed

V. Due Process

The aim of the requirement of due process is to prevent fundamental unfairness in the use of evidence, whether true or false. Colorado v. Connelly, ___ U.S. ____, 107 S.Ct. 515 (1986); Lisenba v. California, 314 U.S.

219, 236 (1941). The function of a district court on habeas review, however, is not to determine whether evidence has been admitted in violation of applicable state rules. United States ex rel Mertz v. New Jersey, 423 F.2d 537 (3d Cir. 1970). Evidentiary errors during a state criminal trial are not subject to review in a habeas corpus proceeding unless it is shown that the error was so "conspicuously prejudicial" as to deprive the petitioner of a fair trial. United States ex rel Abdus-Sabur v. Cuyler, 653 F.2d 828, 833 (3d Cir.), cert. denied, 454 U.S. 1088 (1981); United States ex rel Cannon v. Maroney, 373 F.2d 908 (3d Cir. 1967).

As a general rule, evidence of prior criminal conduct is inadmissible in a criminal case, since it creates a great degree of risk that the factfinder will take it as demonstrating a defendant's

propensity to commit unlawful acts, thus increasing the likelihood that he is guilty of the offense with which he is charged in the pending prosecution. United States ex rel Choice v. Brierley, 460 F.2d 68 (3d Cir. 1972). The rule, however, is subject to exception; evidence of prior criminal activity may be admissible if probative of the issues of motive, identity, or a system or plan of criminal activity. Spencer v. Texas, 385 U.S. 554, 560 (1976).

Difficulty inevitably arises in the application of the rule. "What may not be admissible in one situation may well be admissible in another." Brierley, supra, at 71. "The wiser opinions...recognize that the problem is...one of balancing, on the one side, the actual need for the other-crimes evidence...and on the other, the degree to which the jury will probably be

roused by the evidence to overmastering hostility [toward the defendant]." McCormick, The Law of Evidence (2d ed.) § 190.

Where the evidence presented is purely documentary, such as where the jury is simply informed of the fact of the defendant's previous convictions, the potential for prejudice is relatively slight; the jury is not presented with detailed information concerning the nature of the previous crimes and, therefore, whatever prejudice is engendered may be sufficiently counterbalanced by limiting instructions provided by the court. Under such circumstances, due process is not likely to be violated. See, e.g., Spencer v. Texas, supra (holding that admission of the defendant's criminal history under a state recidivist statute does not run afoul of the Fourteenth Amendment because "the

evidence is...almost always of a purely documentary kind, and in [the case at hand] there is no claim that its presentation was in any way inflammatory." 385 U.S. at 526). Cf. United States ex rel Lowry v. Myers, 364 F.2d 297 (3d Cir. 1966); United States ex rel Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962), cert. denied, 374 U.S. 828 (1963).[3]

A review of the factual circumstances of other cases holding the admission of the other-crimes evidence unconstitutional would serve little pur-

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[3]At least one circuit has determined that the admission of purely documentary evidence on occasion may rise to the level of a due process violation. In Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981), the Court held that the admission of defendant's conviction for counterfeiting, during a murder prosecution, deprived him of the "fundamental fairness" guaranteed by the Fourteenth Amendment.

pose. Questions of prejudice and fairness necessarily turn upon the circumstances of the particular case; reasonable minds may differ over the degree of prejudice generated. The Court is aware that state court determinations concerning admissibility of such evidence should be rejected "only in the clearest of cases of gross and easily avoided prejudice." United States ex rel Rucker v. Myers, 311 F.2d 311, 315 (3d Cir. 1962), cert. denied, 374 U.S. 844 (1963). Unfortunately, we are convinced that this is such a case.

The trial judge, in evaluating the probative value of Ricky Rutherford's testimony concerning Nichols' death, determined that it was relevant to the issues of motive, presumably for the reason that at the time the defendants were stopped by officer Miller, they were traveling in Nichols' car, which

contained his personal identification. The killing of Officer Miller thus could be seen to be consistent with an attempt to avoid apprehension for the prior crime. The trial judge also ruled that the evidence of Nichols' death was relevant to the degree of murder in the Miller prosecution.

Had the trial court limited the testimony of Rutherford, as requested by petitioner's counsel, excluding the details of the torture-murder of Nichols, this Court would be unwilling to conclude that a fair trial had been denied. The purposes for which the trial judge ruled the evidence admissible would have been fully served had the jury simply been presented with fact that another murder had been committed earlier in the morning of January 3, 1980, and that the car in which the defendants were traveling at the time of

the Miller homicide belonged to that murder victim.

The jury, of course, heard the testimony concerning Officer Miller's death, which testimony could not have failed to have an emotional impact. The circumstances of his death, however, were obviously relevant and, while certainly tragic, by no means were as likely to inflame the jury as the detailed recitation of the torture, intimidation and humiliation which petitioner and his co-defendant forced Nichols to endure.

The trial judge gave a limiting instruction concerning the evidence of Nichols' murder at the close of the case, more than a week following Rutherford's testimony. The jury was instructed that they were not to consider the testimony for any purposes other than motive or to rebut Travaglia's claim that the shooting of Miller was

accidental. For a jury to so limit their consideration, however, would require "a feat of psychological wizardry verg[ing] on the impossible even for berobed judges." United States ex rel Scoleri v. Banmiller, 310 F.2d 720, 725 (3d Cir. 1962). See also United States ex rel Rucker v. Myers, supra, at 315. The judge's instruction could not have remedied the prejudice created by the admission of this evidence.

In summary, the prejudicial effect of the detailed testimony concerning Nichols' death was enormous and easily could have been avoided. Its probative value was non-existent. The jury's deliberations concerning guilt and later, punishment, could not have failed to be affected in some significant measure by Rutherford's testimony regarding the earlier murder. The Court has no

hesitation concluding that petitioner was deprived of his constitutionally guaranteed right to a fair trial.

This conclusion does not end the Court's inquiry, however. Not every constitutional violation necessarily results in the grant of a writ of habeas corpus. Bisaccia v. Attorney General of the State of New Jersey, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980). Due process violations are subject to a harmless error analysis; the Court must determine whether there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18, 24 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963).

Application of the harmless error doctrine requires the district court to be able to declare a belief that the constitutional error was harmless beyond

a reasonable doubt. Chapman, supra; United States v. Scarfo, 685 F.2d 842 (3d Cir. 1982), cert. denied, 459 U.S. 1170 (1983). This inquiry compels an examination of the importance of the erroneously admitted evidence in the context of the trial as a whole. United States v. Schaefer, 691 F.2d 639, 646 (3d Cir. 1982).

Applying these principles to the instant case, the Court concludes that the evidence of petitioner's guilt was so overwhelming that, even given the highly inflammatory nature of the testimony concerning Nichols' death, the jury could not have failed to return a verdict of guilt. In addition to testimony tying petitioner to the Nichols' vehicle, and tying the Nichols' vehicle to the scene of the Miller homicide, petitioner's statement was admitted into evidence. The statement contained the

admission that petitioner was present in the vehicle at the time Travaglia fired on the police officer. In addition, Travaglia's inculpatory statement was admitted. Finally, the statements of the petitioner and Travaglia are consistent with the testimony of Rutherford, who was an eyewitness to Officer Miller's death.

Despite the foregoing, however, the Court is unable to conclude beyond a reasonable doubt that the admission of the evidence of Nichols' death played no role in the jury's determinations, specifically those concerning the degree of homicide for which petitioner was to be found guilty. The jury was instructed on first, second and third degree murder, as well as manslaughter. Particularly given the fact that petitioner was charged only as an accomplice, and clearly was not the principal actor in

the crime, it cannot be said with certainty that the jury only could have returned the verdict of first degree murder which it did. Only a verdict of first degree murder carries with it the possible penalty of death. 42 Pa.C.S.A. § 9711.

Moreover, even assuming arguendo that the first degree murder conviction was inevitable, this Court cannot conclude beyond a reasonable doubt that the testimony concerning Nichols' death did not sway the jury, during the penalty phase, to return a sentence of death rather than one of life imprisonment.

The Fourteenth Amendment guarantees the right of a fundamentally fair trial to the guilty and the innocent alike. Where a sentence of death has been imposed and it cannot be said beyond a reasonable doubt that erroneously admitted, highly prejudicial testimony played

no role in the decision to impose such a grave penalty, the Constitution requires that petitioner be granted the requested relief.[4]

An appropriate Order will be issued.

/s/ Alan M. Bloch
United States District Judge

Date: 5/2/88

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[4]The grant of the writ of habeas corpus does not give rise to double jeopardy concerns. Reversal of a conviction for trial error does not bar retrial under the Fifth Amendment, since it implies nothing with respect to the guilt or innocence of the defendant or the strength of the government's case. Burks v. United States, 437 U.S. 1, 15 (1978); Vogel v. Pennsylvania, 790 F.2d 368, 370 (3d Cir. 1986); Commonwealth v. Vogel, 501 Pa. 314, 461 A.2d 604 (1983), cert. denied, 465 U.S. 1104 (1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 86-1238

JOHN CHARLES LESKO,
Petitioner

v.

GLEN R. JEFFES, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional institution at Rockview; HENRY G. BARR, General Counsel of Pennsylvania; and LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,
Respondents

O R D E R

AND NOW, this 2nd day of May, 1988, having found that the Commonwealth of Pennsylvania holds John Charles Lesko in custody in violation of the Constitution of the United States.

IT IS HEREBY ORDERED that a writ of habeas corpus shall issue discharging the petitioner from custody imposed pursuant to his conviction and sentence in the Court of Common Pleas of Westmoreland County, Pennsylvania, At No. 681 C of 1980, unless the Commonwealth retries the petitioner within 180 days of this date.

/s/ Alan M. Bloch
United States District Judge

APPENDIX G

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 723 PITTSBURGH 1985

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN C. LESKO
Appellant

Appeal from the Order entered May 7, 1985 in the Court of Common Pleas of Indiana County, Criminal No. 35 Crim. 1980.

BEFORE: DEL SOLE, MONTGOMERY AND LIPEZ, JJ.

PER CURIAM: FILED: JUNE 23, 1986

Appeal Quashed.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 723 PITTSBURGH 1985

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN C. LESKO
Appellant

Appeal from the Order entered May 7, 1985 in the Court of Common Pleas of Indiana County, Criminal No. 35 Crim. 1980.

BEFORE: DEL SOLE, MONTGOMERY AND LIPEZ, JJ.

MEMORANDUM:

Appellant, John Charles Lesko, pled guilty to murder in the second degree on May 19, 1980, and was subsequently sentenced to life imprisonment. From the Indiana County Court of Common Pleas' denial of his petition to withdraw the guilty plea a direct appeal was taken to this court which subse-

quently transferred the matter sua sponte to the Pennsylvania Supreme Court. For the sake of judicial ecomony, our Supreme Court also assumed jurisdiction of Appellant's claim of ineffectiveness of counsel which was raised for the first time on appeal. Having determined that remanding for an evidentiary hearing would not be of assistance, Appellant's claims were considered and the judgment of sentence was affirmed. See: Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1982).

Appellant then filed a pro se petition under the Post Conviction Hearing act on April 15, 1985, alleging ineffectiveness of counsel. The essence of Appellant's claim is that counsel miscommunicated the terms of the plea agreement entered into between the Commonwealth and himself. By order dated April 19, 1985, filed April 23,

1985, the petition was denied without appointment of counsel or hearing. On May 6, 1985, Appellant filed a motion for reconsideration of the Order Denying the Post Conviction Hearing Act petition and additionally filed a motion for notes of trial testimony and other court records. These motions were denied by Order dated and filed May 7, 1985. On May 31, 1985, Appellant filed a notice of appeal from the May 7, 1985 order and by order filed June 11, 1985, present counsel was appointed to represent Appellant for purposes of this appeal.

We quash this appeal as having been untimely filed. "Where an appeal has been filed untimely, the defect is jurisdictional and may be raised by this Court sua sponte."[1] Commonwealth

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[1]The Commonwealth has failed to file a Brief in this matter without explanation.

v. Williams, 313 Pa.Super. 81, 82, 459 A.2d 420, 421 (1983). "The notice of appeal 'shall be filed within 30 days after the entry of the order from which the appeal is taken.' Pa.R.A.P. 903(a)" Commonwealth v. Fisher, 321 Pa.Super. 534, 535, 468 A.2d 1117, 1118 (1983). Although Appellant filed the notice of appeal pro se, this does not alter the result. Id. at 536 n.1, 468 A.2d at 1118 n.1. "Moreover, and in any event, an appeal will lie only from a definitive order, decree or judgment which finally terminates the action." Commonwealth v. Williams, supra, 313 Pa.Super at 83, 459 A.2d at 421. "[W]hile it is procedurally permissible for a party to appeal a lower court's order and at the same time request the lower court itself to reconsider such order, Pa.R.A.P. 1701, a subsequent denial of reconsideration by the lower

court is not an appealable order." Dillon by Dillon v. Nat. R.R. Corp., 345 Pa.Super. 126, 130, 497 A.2d 1336, 1337 (1985). "Only where then the lower tribunal affirmatively and timely grants reconsideration is the appeal period tolled. See Pa.R.A.P. 1701(b). If reconsideration is timely granted, the appeal period begins to run anew from the decision on reconsideration. See: Pa.R.A.P. 1701(b)(3)." Lee v. Zoning Bd. of Adjust. of Philadelphia, ___ Pa.Cmwlth. ____, ____, 496 A.2d 885, 887 (1985). "Appellant's attempt to challenge the trial court's refusal of his petition for reconsideration is improper." Seibel v. Allstate Ins. Co., ___ Pa.Super. ____, ____, 499 A.2d 666, 670 (1985). The order which terminated the action and therefore is the appealable order is that which denied Appellant's Post Conviction

Hearing Act Petition, dated April 19, 1985 and filed April 23, 1985. The notice of appeal, as previously stated, was filed May 31, 1985. "We will not permit appellant to do indirectly that which he cannot do directly." Provident Nat. Bank v. Rooklin, 250 Pa.Super. 194, ____, 378 A.2d 893 (1977). Because this appeal was not timely filed it is hereby quashed.

APPENDIX H

IN THE COURT OF COMMON PLEAS
OF INDIANA COUNTY, PENNSYLVANIA

NO. 35 Crim. 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

OPINION AND ORDER OF COURT

EARLEY, J.

This matter comes before the Court on the Petition of John Charles Lesko ("Lesko") under the Post Conviction Hearing Act ("PCHA").

This Court has determined that Mr. Lesko's petition is denied without a hearing.

DISCUSSION

Mr. Lesko's basis for this petition is ineffectiveness of counsel specifi-

cally, Lesko claims that his trial counsel miscommunicated the terms of the plea agreement entered into between the Commonwealth and himself.

On May 19, 1980, when Lesko plead guilty to a charge of murder in the second degree, the Commonwealth agreed to dismiss the other charges filed against him and not to pursue sentencing of Mr. Lesko until after June 2, 1980 or later. It was cousel's strategy that by delaying sentencing in that manner the guilty plea in this Court would not be considered an aggravating circumstance for purposes of a murder trial in Westmoreland County. At the time when the Court accepted Mr. Lesko's plea, it was made certain that he understood the agreement and entered into it willingly.

The Pennsylvania Supreme Court has previously ruled that counsel's decision to seek a delay in sentencing was

neither unreasonable nor ineffective, that there was no breach of the plea agreement by the Commonwealth, and that defendant understood the exact nature of the agreement. Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983). Under the PCHA, the issues raised now by Mr. Lesko's petition are considered finally litigated. 42 Pa.C.S.A. § 9544(a)(3). Moreover, a petitioner cannot seek further review through PCHA proceedings where a court considered and rejected his claim on direct appeal. Commonwealth v. McKenna, 498 Pa. 416, 446 A.2d 1274.

This Court has no alternative but to deny Mr. Lesko's petition without a hearing based on the above cited authority.

WHEREFORE, the Court makes the following Order:

IN THE COURT OF COMMON PLEAS
OF INDIANA COUNTY, PENNSYLVANIA

NO. 35 Crim. 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

ORDER OF COURT

EARLEY, J.

AND NOW, April 19, 1985, the Petition for Post Conviction Hearing is denied without a hearing.

BY THE COURT,

/s/ Robert C. Earley
President Judge

APPENDIX I

COMMONWEALTH of Pennsylvania

v.

John Charles LESKO, Appellant.

Supreme Court of Pennsylvania.

April 2, 1986.

Application No. 42 W.D. Appeal Dkt. 1985 for Reargument.

Prior report: 509 Pa.67, 501 A.2d 200.

ORDER

PER CURIAM.

The Application for Reargument is denied.

The matters raised by appellant as pending before the United States Supreme Court have already been fully considered by this Court, either during appellant's direct appeal or his post conviction proceeding.

With respect to counsel's contention that this Court considered matters outside the record in determining the

"appropriateness or proportionality" of the death sentence, we first remind counsel that the transcript of the trial is not the whole record. Our present recitation of the facts, which does not differ from the statement by this Court on direct appeal, was drawn from the record and presented to provide a complete picture of the events which occurred. See Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983).

Moreover, the facts taken from the suppression record were not and could not be considered by us in dealing with the proportionality issue. In considering the proportionality of appellant's sentence, this Court looked only at the mitigating and aggravating circumstances which were considered by the jury in reaching its decision. These factors, all of which were part of the trial

transcript, were sufficient for us to determine that appellant's sentence was not disproportionate to the penalty imposed in similar cases. See Commonwealth v. Travaglia, 502 Pa. at 504-05, 467 Pa. at 303-04.

FLAHERTY, J., did not participate in the consideration or decision of this case.

APPENDIX J

COMMONWEALTH of Pennsylvania, Appellee,

v.

John Charles LESKO, Appellant,

Supreme Court of Pennsylvania.

Argued Sept. 16, 1985.

Decided Nov. 12, 1985.

Before NIX, C.J., and LARSEN, McDERMOTT, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

HUTCHINSON, Justice.

John Charles Lesko, appellant, appealed to us a Westmoreland County Common Pleas order denying his petition for post-conviction relief from that court's death sentence without a hearing. After filing his appeal in this Court, he asked us to transfer the record to Superior Court, claiming that we lacked initial appellate jurisdiction over post-conviction appeals in capital cases. On the merits, asserting breach of a plea bargain, he contends Westmore-

land County Common Pleas erred in holding that his right to withdraw his guilty plea to a related murder had been finally determined against him by us in Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1982), on direct appeal from the Court of Common Pleas of Indiana County, the court with initial jurisdiction over that related murder. He also contends that he has been denied adequate appellate review on the proportionality of his sentence and that the trial judge's instructions to the Westmoreland County sentencing jury not to be swayed by sympathy for either his victim or appellant himself violated the requirement of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1977), that an "individualized decision is essential in capital cases" because "the uniqueness of the individual is far more important than in non-capital

cases." 438 U.S. 586, 605, 98 S.Ct. 2954, 2965.

We now hold that under the present version of our Post-Conviction Hearing Act, Act of May 13, 1982, P.L. 417, 42 Pa.C.S. § 9541-9551, appeals of Common Pleas decisions are within Superior Court's jurisdiction, and that this method of appeal is not in conflict with either Section 722 of the Judicial Code, 42 Pa.C.S. § 722, relating to our jurisdiction on direct appeals from Common Pleas, or Section 9711(h) of the Sentencing Code, 42 Pa.C.S. § 9711(h), relating to our automatic review of death sentences. Nevertheless, because of the uncertainty surrounding this jurisdictional issue of first impression, its importance in the administration of our death penalty act and the uncertainties further delay would impose in this case, we will accept appellant's appeal and,

instead of transferring it to Superior Court pursuant to 42 Pa.C.S. § 5103(a), retain jurisdiction here under 42 Pa. C.S. § 726. Since we have already decided all the issues raised in this collateral proceeding against appellant in either his direct appeal from his Westmoreland County conviction and sentence[1] or his appeal from the Indiana County Common Pleas' denial of his petition to withdraw his guilty plea to the murder of William Nicholls[2] and no extraordinary circumstances have been averred or found by us, the issues appellant raises on this appeal are unavailable to him as grounds for post-

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[1]Appellant's direct appeal was consolidated with that of his co-defendant and is reported at Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1982).

[2]See Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1982).

conviction relief under Section 9544 of the Post-Conviction Hearing Act, 42 Pa. C.S. § 9544. We therefore rule against him on the merits. Having so ruled, and having thoroughly reviewed all aspects of the record relating to his conviction and sentence in his direct appeals, we affirm Common Pleas.

After a Westmoreland County jury found appellant guilty of murder in the first degree in the ambush killing of police officer Leonard Miller, the Commonwealth called the District Attorney of Indiana County as a witness in the sentencing phase to show that appellant had entered a guilty plea to second degree murder in Indiana County Common Pleas to the killing of William Nicholls in that county after Nicholls had been abducted and robbed. This testimony was presented to establish one of the aggravating circumstances which our death

penalty statute permits a jury to consider in deciding whether a person which it has found guilty of first degree murder should be sentenced to death or life imprisonment. The particular aggravating circumstance as to which appellant's Indiana County plea was relevant is Section 9711(d)(10) of the Sentencing Code, 42 Pa.C.S. § 9711(d)(10), a conviction of "another . . . offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was impossible . . . ." Murder in the second degree, felony murder, here based on the robbery of Nicholls, is a crime for which a sentence of life imprisonment is mandatory. Section 1102 of the Crimes Code, 18 Pa.C.S. § 1102. The record in the guilt phase of appellant's trial for the killing of Miller in Westmoreland County shows, independently of

the testimony of the Indiana District Attorney and the records he identified at the sentencing phase, that appellant and others had abducted Nicholls in Nicholl's own car in Allegheny County and forced him to drive with them out of town, after appellant's Westmoreland County co-defendant, Michael Travaglia, had shot Nicholls in the arm. Abusing Nicholls along the way, they went to a lake in Indiana County, where they bound and gagged Nicholls and weighted him with rocks. So trussed and weighted, they carried him to the lake, broke the ice on it and threw him into water over his head. Still in Nicholls's car, with his belongings and a gun which connected them to another killing which occurred within a week of the killings of Nicholls and Miller and to a series of robberies of convenience stores in Indiana and Westmoreland Counties within

the same time frame, appellant and his accomplice encountered Officer miller enticed him into a chase, pulled over and killed him as he approached their stopped vehicle.

This Court provided appellant with the automatic review which the law requires us in capital cases in his direct appeal from his conviction and death sentence in the killing of Officer Miller. That review is mandatory under Section 9711(h) of the Sentencing Code, 42 Pa.C.S. § 9711(h).[3]

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[3]The Sentencing Code provides in pertinent part:

(h) Review of death sentence.-

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the

(footnote continued on next page)

The jurisdictional basis for the automatic review required by Section 9711(h) of the Sentencing Code is provided by Section 722(4) of the Judicial Code, 42 Pa.C.S. § 722(4).Section 722 gives this Court "exclusive jurisdiction of appeals from final orders of the courts of common pleas" in certain specified classes of cases. Subsection (4) includes in those classes "[a]auto-

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[3](continued) imposition of a life imprisonment sentence.

> (3) The Supreme Court shall affirm the sentence of death unless it determines that:
> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
> (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S. § 9711(h).

matic review of sentences as provided by 42 Pa.C.S. § 9711(h) (relating to review of death sentence)."

Prior to the Act of September 23, 1980, P.L. 686, No. 137, § 1, effective November 22, 1980 (Act 137 of 1980), Section 722 of the Judicial Code included among the classes of cases within our exclusive jurisdiction, under the former version of its subsection (1), "Felonious homicide."

In Commonwealth v. Fauntroy, 475 Pa. 287, 380 A.2d 357 (1977), we had interpreted Section 202 of our repealed Appellate Court Jurisdiction Act,[4] which was identical in language with the former version of Section 722(1) of the Judicial Code, as giving us exclusive jurisdiction not only of direct appeals

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[4]Act of July 31, 1970, P.L. 673, art. II, § 202, formerly 17 P.S. § 211.202.

in cases of felonious homicide, but also of appeals in post-conviction proceedings concerning them.

However, Section 722(1) of the Judicial Code now grants us exclusive jurisdiction only over "matters prescribed by general rule." Judicial power over collateral post-conviction review of criminal proceedings was specifically granted by the legislature under the Act of December 20, 1982, P.L. 1409, No. 326, Art II, § 201, effective February 18, 1983; 42 Pa.C.S. § 9501. It provides:

> § 9501. Procedures, motions and other matters.
>
> Except as otherwise provided by this chapter all post-trial procedures, motions and other matters relating to any criminal proceeding shall be conducted in the manner, at the times, on the terms and conditions and in the form prescribed by general rules.

Rules implementing this statute have been adopted as Chapter 1500 of our Rules of Criminal Procedure, Pa.R. Crim.P. 1501-1507. Rule 1507 expressly suspends the Post-Conviction Hearing Act of 1982, 42 Pa.C.S. § 9541-9551, insofar as it is inconsistent with the rules. Neither the rules themselves nor the 1982 Post-Conviction Hearing Act expressly provide for appellate jurisdiction.

However, Section 742 of the Judicial Code, 42 Pa.C.S. § 742, relating to appeals from courts of common pleas in cases not entrusted to us provides:

> § 742. Appeals from courts of common pleas.
>
> The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.

Act No. 137 of 1980, which amended Section 722 of the Judicial Code into its present form, had as a prime purpose relieving this Court of the burden of dealing with all appeals in cases of felonious homicide, including the repeated appeals such cases of often generated under the Post-Conviction Hearing Act and converted this Court into one with primarily discretionary appellate jurisdiction. It had as its prime mover former Chief Justice Michael Eagan, who labored intensely in educating the bar, the public and the legislature on the adverse effect the burden of often frivolous appeals and reappeals was having on our ability to discharge our administrative and supervisory powers as governing authority of the unified judicial system, along with our rule making function and our prime judicial duty of clearly and carefully delineating the

law of this Commonwealth in areas of general import in which its meaning or application was in dispute. Recognizing the increased burden the removal of these and other matters from our jurisdiction would have on Superior Court, the legislature had passed the Act of June 11, 1980, P.L. 213, No. 63, 42 Pa.C.S. § 541, increasing the size of Superior Court from seven to fifteen members. In Act 137, the legislature was also careful to rewrite Section 722(4) of the Judicial Code to insure by explicit requirement that an automatic, searching and independent review of all death sentences would be available in this Court on a mandatory basis, in accordance with Section 9711(h) of the Sentencing Code. As stated, this appellant has had such a review.

For us to conclude that either this appellant, others sentenced to death or

the Commonwealth itself have a right to appeal to us final orders of the courts of common pleas in collateral attacks on death sentences by postconviction proceedings would not, to our mind, further the legislative purpose in passing the 1980 amendments to both the Judicial Code and the Post-Conviction Hearing Act. The development of any issues appropriately raised on collateral attack is, we believe, better left to the normal appellate process under Section 742 of the Judicial Code. In that manner, attempts to relitigate questions we have already decided can be screened and new or unseen issues not finally litigated or waived fully explored. When such new issues arise, which should rarely occur because of the broad and searching review we make on direct appeal, they can be considered in this Court on petition of either party,

addressed to our discretionary jurisdiction under Section 724 of the Judicial Code. Thus, any significant issue of statewide import can be fully considered here on a discretionary basis. The remedies available under the Post-Conviction Hearing Act are derivative of those available under the ancient writ of habeas corpus. That writ was always available in the lower courts. We therefore see no anomaly in permitting them to consider, in the first instance, whether collateral relief is available under Section 9543 of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9543.[5] Those few capital cases which involve issues which we have not considered and which, therefore, remain open under the Act, are subject to the

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[5]Section 9543 sets forth the substantive basis for post-conviction relief.

normal process of full appellate review in Superior Court and discretionary review here.

Considering the legislative history and purpose behind Act. No. 137 of 1980, which included the amendment to Section 722 of the Judicial Code deleting the category of felonious homicides from our exclusive appellate jurisdiction, and the fact that we have not utilized the present version of § 722(1) to adopt a general rule providing for our exclusive jurisdiction in collateral attacks on death sentences, we conclude that they are not normally within it, but instead encompassed within the appellate jurisdiction of Superior Court under Section 742 of the Judicial Code, as appeals "from final orders of the courts of common pleas,. . . [not] within the exclusive [appellate] jurisdiction of the Supreme Court or the Commonwealth Court."

However, because the appropriate resolution of this appellate jurisdiction issue is a matter of first impression which was not free of doubt, appellant's initial action in filing his appeal from the denial of post-conviction relief with us was not unreasonable. In dealing with it, we have had the benefit of full briefing and argument on the issues he raises on the merits. Therefore, in this particular case, it seems to us that a transfer back to Superior Court without a decision on the merits would be a wasteful use of judicial resources and only serve to prolong the cruel apprehension which the repeated appeals and delays of our legal system imposes. Both the convicted murderer and society have a right to a thoughtful, but reasonably prompt, disposition of these cases. With those thoughts in mind, exercising the power

the legislature has given us in Section 726 of the Judicial Code, we deny appellant's application to transfer this particular case.

Proceeding to a consideration of the merits of this appeal, we agree with the Westmoreland County Court of Common Pleas that appellant's petition for post-conviction relief must be denied. Our Post-Conviction Hearing Act provides: "To be eligible for relief under [it], a person . . . must prove . . . (4) That the error resulting in his conviction and sentence has not been finally litigated or waived." 42 Pa. C.S. § 9543(4).

With respect to hearings, it specifically states:

> § 9549. Hearing on petition.
>
> . . .
>
> (b) When not required.-The court may deny a hearing if the petitioner's claim is patently frivolous and is without a trace

> of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held at the original trial or at any later proceeding.

42 Pa.C.S. § 9549(b).[6] The Post-Conviction Hearing Act further provides:". . . an issue is finally litigated if: . . . (3) The Supreme Court has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(3). We have so ruled on two of the three issues raised by appellant. The remaining issue, involving Lockett v. Ohio, supra, if not finally determined, was waived under Section 9544(b) of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9544(b).

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[6]Pa.R.Crim.P. 1504, relating to summary dispositions without the appointment of counsel is consonant with this section.

In Commonwealth v. Travaglia, 502 Pa. 474, 503, 467 A.2d 288, 303 (1983), we addressed the proportionality issue as required by our death penalty statute, Section 9711(h)(3)(iii) of the Sentencing Code, 42 Pa.C.S. § 9711(h)(3)(iii), and expressly held the imposition of the death sentence upon appellant was not excessive or disproportionate. In that connection, we said:

> We have searched the records of these cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed in these similar cases.

502 Pa. at 505, 467 A.2d at 304.

Appellant attempts to avoid this holding with the argument that we failed to consider the fact that his co-defen-

dant, Travaglia, was the trigger man in the killing of Officer Miller and that the imposition of a death sentence on appellant, as a mere accomplice, would be disproportionate. This is merely a different way of raising the proportionality issue. As such, it does not avoid our final holding that the death penalty imposed on him was neither "excessive or disproportionate." See Commonwealth v. Wilson, 452 Pa. 376, 305 A.2d 9 (1973). Besides, his argument implies that imposition of a death sentence on the killer precludes the imposition of the same penalty on any of his accomplices. We have already rejected the argument that a death sentence for a co-defendant who did not do the actual killing is disproportionate when the killer himself received a sentence of imprisonment. Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984). We would therefore

reject appellant's argument on the proportionality issue even if our holding on direct appeal and the statute itself did not preclude it as a ground for relief in this collateral proceeding.

Appellant's argument that the trial court erred in its instruction to the jury to disregard sympathy[7] was not directly dealt with in our opinion

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[7]The charge in this regard was as follows:

> Now, the verdict is for you, members of the jury. Remember and consider all of the evidence, giving it the weight to which you deem it is entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision--into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance.

N.T. January 31, 1981, Sentencing Hearing at 1706.

on his direct appeal.[8] Nevertheless, it was available to him and no extraordinary circumstances are referred to which would justify his not raising it then. See Section 9544(b)(2) of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9544(b)(2); Commonwealth v. Pfaff, 496 Pa. 572, 437 A.2d 1188 (1981). Moreover, Lockett v. Ohio, supra, on which he relies, had already been decided. Therefore, he cannot claim "[t]he abridgement . . . of . . . a right that was not recognized as existing at the

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[8]An analogous issue, raised in connection with his claim of prosecutorial misconduct, was dealth with and rejected when we stated:

> It is clear from reading this argument as a whole that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their sympathy....This was not an improper argument for the prosecutor to have made.

Commonwealth v. Travaglia, 502 Pa. at 501, 467 A.2d at 301.

time of the trial if the constitution requires retrospective application of that right." Section 9543(3)(xii) of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9543(3)(xii). The Act provides in this respect:

> § 9544. When an issue is finally litigated or waived.
>
> . . . .
>
> (b) Issue waived.-For the purposes of this subchapter, an issue is waived if
>
> (1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.
>
> (2) The petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue.
>
> (c) Presumption.-There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

42 Pa.C.S. § 9544(b) and (c). Appellant makes no assertion of ineffectiveness nor of any other extraordinary circumstance which would justify present consideration of this issue. Indeed, counsel at oral argument both here and on direct appeal expressly disclaimed any charge of ineffectiveness. The record indicates such a contention would be difficult to sustain under the standards of ineffectiveness set out either in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). See Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1982). We would therefore be justified in holding this issue was waived. However, rather than relying on either waiver or analogy, we will treat it on the merits,

as a new argument. So treated, we reject it for the following reasons.

Read as a whole, the trial judge's charge fully and fairly presented to the jury its duty to consider and weigh the aggravating factors which accompanied this killing against all mitigating factors, including the broad mitigation provision of Section 9711(e) of the Sentencing Code, 42 Pa.C.S. § 9711(e)(8). That section provides that "[m]itigating circumstances shall include the following: . . . (8) [a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8). This last mitigating factor constituted the legislative response to our decision in Commonwealth v. Moody, 476 Pa.223, 382 A.2d 442 (1977), holding a former version of the death penalty

statute unconstitutional on reasoning analogous to Lockett.

We believe that the presentation of that mitigating factor to the jury as part of the trial judge's charge,[9] satisfies Lockett. We have carefully reviewed the opinions of the California Supreme Court with respect to this issue in People v. Lanphear, 36 Cal.3d 163, 680 P.2d 1081, 203 Cal.Rptr. 122 (1984) and People v. Easley, 34 Cal.3d 858, 671 P.2d 813, 196 Cal.Rptr. 309 (1983), and find them unpersuasive.

Appellant's main argument is that use of his Indiana County guilty plea to second degree murder for the killing of Nicholls as an aggravating circumstances in the killing of Officer Miller violated the plea bargain on which it was

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[9]See N.T. January 31, 1981 Sentencing Hearing at 1704.

based. That issue was also determined adversely to him in his appeal from the denial of his petition to withdraw the Indiana County guilty plea. Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983). Again, his present argument is a variant on the same issue, as considered in that case. In it, we held that the fact he had not yet been sentenced for the Nicholls murder did not preclude use of his guilty plea as evidence of the aggravating circumstance defined at Section 9711(d)(10) of the Sentencing Code, 42 Pa.C.S. § 9711(d)(10), in the Miller killing and that his counsel was not ineffective in permitting him to enter it. There we said:

> In the lower court opinion, the trial judge found that 'the evidence established: that the defendant entered his plea of guilty to second degree murder upon agreement of the Commonwealth to delay sentenc-

ing as a deliberate choice of trial strategy in an effort to prevent evidence of his criminal acts in Indiana County from being considered as an aggravating circumstance during his first degree murder trial for killing a Westmoreland County police officer.' (R.51). The Appellant agrees with this finding and now argues that his trial counsel was ineffective for persuading him to plead guilty in that trial counsel's conception of the use of this plea in the Westmoreland County case was in error. Because it appears that the action of the Appellant's trial counsel was a calculated attempt to avoid the use of any Indiana County conviction in the Westmoreland County case as an aggravating circumstance, trial counsel cannot be deemed to be ineffective.

. . . .

It was hoped that by following this course, the Westmoreland County judge would disallow the Indiana County guilty plea from being introduced in the penal phase of the trial as an aggravating circumstance, because no sentence had been imposed in Indiana County. However, the Westmoreland County trial judge correctly determined that the plea was admissible. Although trial counsel's strategy failed, he cannot be deemed

> ineffective. Having determine that trial counsel's actions were reasonable and designed to protect the Appellant's interests, it is clear that these actions cannot be deemed ineffective.

502 Pa. at 514-16, 467 A.2d at 308-10 (footnotes omitted).

Appellant now argues that this holding is not a final determination of the issue because he "believed" the terms of the bargain would preclude use of the Nicholls killing as an aggravating circumstance at the sentencing phase of his trial for the murder of Officer Miller. In the words of his counsel at the hearing on the petition to withdraw, he claims there was an "implicit" condition that the plea would not be used against him in the upcoming Westmoreland County trial.

The bargain, which was recorded as part of the transcript on the guilty

plea, includes no such condition.

THE COURT: Now, Mr. Armstrong, has there been a plea bargain in this case?

MR. ARMSTRONG: Yes.

THE COURT: Would you tell me what it is?

MR. ARMSTRONG: Yes. At No. 35, the Commonwealth has agreed to dismiss the complicity charges. And also under #63 Crim. 1980, has agreed to dismiss the robbery and under #64 Crim. 1980, they have agreed to dismiss the robbery charges.

THE COURT: In other words, all of the charges at #63 and #64 Crim. 1980, would be dismissed and the complicity charge at #35 Crim. 1980, would be dismissed upon the [Appellant's] agreement to enter a plea of guilty to murder of the second degree?

MR. ARMSTRONG: Yes. And also that the sentencing would be passed in late June.

THE COURT: And these robbery charges at #63 and #64 Crim. 1980, and the complicity charge at #35 Crim. 1980, would be nol prossed just before sentencing; is that correct?

MR. ARMSTRONG: That is my understanding.

MR. MARTIN: That is correct, your Honor.

BY THE COURT:

Q. All right. Have you understood the conversation between your attorney and the District Attorney and myself?

A. Yes.

Q. In other words, you're promising to enter a plea of guilty to murder of the second degree which carries a penalty of life imprisonment and in exchange to that the Commonwealth agrees to drop all of the charges of #63 Crim. 1980 and #64 Crim. 1980 and also the complicity charge at #35 Crim. 1980, and that would be done at the time of sentencing. And sentencing is not to take place until the end of June or later; is that correct?

MR. ARMSTRONG: We had talked about late June, your Honor, but the date wasn't set.

BY THE COURT:

Q. Do you understand that?

A. Yes.

Q. And is that your understanding of the agreement?

A. Yes.

N.T. May 19, 1980 at 31-33. At sentencing, this bargain was fully kept, as shown by the judgment of sentence.[10]

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[10]At sentencing the court ordered:

> AND NOW, June 22, 1981, the defendant having entered a plea of guilty to the offense of criminal homicide classified as murder in the second degree, the sentence being mandated by statute of life imprisonment, the defendant is sentenced as follows:
>
> That he pay the cost of the prosecution in the amount of two hundred eighty-three dollars and sixty cents ($283.60); that he shall pay a fine to the Commonwealth of Pennsylvania for the use of Indiana County in the amount of one hundred dollars ($100); and that he shall undergo imprisonment for the remainder of his natural life in a state (footnote continued next page)

The guilty plea itself was accompanied by an extensive colloquy at a hearing which required 40 pages to record. In it, the presiding judge painstakingly explained to appellant all of his rights, inquired exhaustively into the factual basis for the plea and the terms of the plea bargain. Nowhere is there any objective hint of an agreement that this plea would not be used in evidence if relevant. Appellant's counsel in those proceedings did not deny this. He said only that such a condi-

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[10](continued) correctional institution. For purposes of this sentence he shall be transported by the Sheriff of Indiana County to the Western Diagnostic and Classification Center located at the State Correctional Institution in Pittsburgh, Pennsylvania.

Credit is to be given to this sentence for any time served by the defendant John Charles Lesko because of this offense.

N.T. June 22, 1981 at 4-5.

tion was "implicit." At the hearing on the petition to withdraw it, the District Attorney expressly denied any such implicit agreement. He said:

> BY MR. MARTIN:
>
> Q. Now, are you familiar with the plea negotiations which took place before and on May 19, 1980?
>
> A. I am.
>
> Q. What is your understanding of that plea arrangement?
>
> A. My understanding of the arrangement is this that the Commonwealth agreed to nol pros a complicity charge, to nol pros the robbery charges in return for a plea of guilty to murder in the second degree. On the day of sentencing Mr. Armstrong approached me and it is my recollection that he asked me if sentencing could be deferred until after the Miller trial in Westmoreland County. I didn't object to that.
>
> Q. Why?
>
> A. There were two reasons. First, I knew that a plea of murder in the second degree would carry a mandatory life sentence and second I knew that Mr. Lesko was incarcerated

awaiting trials in both counties, Indiana and Westmoreland, and I believe that he would remain incarcerated and there wasn't a matter of any consequence to me when he was sentenced in Indiana County since he was going to remain in jail.

. . . .

Q. Now, was there any expressed promise made by your or anyone in the District Attorney's Office that this plea that was entered in Indiana County would not be used in Westmoreland County of any other county?

A. There was no discussion at all concerning the use of this plea in any other county and there was certainly no promise from me whether it would or would not be used.

N.T. April 28, 1981 at 37-38, 39-40. On cross-examination, the Indiana County District Attorney again denied any implicit understanding.

All of appellant's rights were fully protected in connection with the entry of this plea. The record on the petition to withdraw it fully supports the

court's refusal to do so. We affirmed that refusal on direct appeal. The terms of the bargain do not contain the agreement appellant now says he "believed" was "implicit" in it. In this connection, the Indiana County Court of Common Pleas said:

> The defendant's argument that this explicit promise by the Commonwealth carried with it an implied promise of later non-use of the plea in other trials is without merit in view of the fact that if the defendant had intended non-use of his plea to be central to his bargain he would have made it part of the bargain. Commonwealth v. Scott, Pa.Super. [271 Pa.Super. 545] 414 A.2d 388, at 390 (1979); United States v. Miller, 565 F.2d 1273, at 1275 (3rd Cir. 1977).

Common Pleas slip op. at 7-8.

We agree with that statement. Indeed, in dealing with the finality of this issue, we can do no better than to quote the reasons given by Judge Early of the Indiana County Court of Common

Pleas in his opinion denying appellant's petition to withdraw this guilty plea.

> The instant case points to the basic problem of the entire criminal justice system, i.e., the problem that no case is every finally resolved. The liberal allowance of withdrawals of pleas of guilty for less than significant reasons amounting to manifest injustice permits criminal defendants to manipulate the courts at the cost of public trust and great financial expense to the taxpayer. In addition, a plea colloquy adhering to the criteria of our statutes and case law renders the reasons for liberally allowing withdrawal of pleas by defendants nugatory because the very purpose of such plea colloquys is to assure that the defendant enters his plea knowingly, voluntarily, and intelligently. Commonwealth v. Sutton, 474 Pa. 582, 379 A.2d 107 (1977); Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 at 1632 [52 L.Ed.2d 136] (1977).
>
> . . . .
>
> The plea is conducted in open court where the defendant is assisted by his attorney and where the Court conducts an extensive give and take with the defendant, who is under oath,....The defendant is

provided with a detailed explanation of the elements of each crime charged. In addition, he is apprised of his right to file post-trial motions and that his right to appeal will be limited if he enters a plea of guilty. He is asked about any plea bargain, the bargain is reviewed, and the defendant is informed that if a breach of the bargain occurs he may withdraw his plea; he is further informed of the maximum limits of any sentence that may be imposed on him by virtue of his plea regarding incarceration and fines. The defendant is then cautioned to listen to the prosecutions' [sic] factual basis for the charges against him and informed that he may challenge any fact recited by the prosecution that he does not agree with.

In the instant case, the Court complied with all of these criteria and on numerous occasions the [appellant] admitted in open court under oath that he understood that by his plea he was admitting that in the course of a robbery of his victim he intentionally bound the victim, kicked the ice loose from the surface of the dam and tossed in the victim, leaving him to drown. Plea colloquy, at 27, at 32-33, at 34, at 38, at 39-40.

Common Pleas slip op. at 13-15.

Affirmed.

PAPADAKOS, J., files a concurring opinion in which McDERMOTT, J., joins.

FLAHERTY, J., did not participate in the consideration or decision of this case.

PAPADAKOS, Justice, concurring.

I join the the reasoning and mandate of the Majority but write separately to express my belief that appeals of Common Pleas decisions in petitions filed under the Post-Conviction Hearing Act in death penalty cases are within our exclusive jurisdiction as part of the automatic review of death sentences imposed upon us by the legislature in Section 9711(h) of the Sentencing Code, 42 Pa.C.S. § 9711(h).

McDERMOTT, J., joins in this concurring opinion.

PER CURIAM:

AND NOW, this 12th day of November 1985, in view of appellant's right to

file an application for reargument, Pa.R.A.P. 2541, et seq. execution of sentence is stayed pending the filing and consideration of the application for reargument.

APPENDIX K

IN THE COURT OF COMMON PLEAS
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION
NO. 681 C 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

OPINION AND ORDER

PROCEDURAL HISTORY:

The above-captioned case comes before this Court on Defendant's Post Conviction Hearing Act Petition. The relief sought in said Petition is "Vacation of Death Sentence."

Defendant was sentenced to death on April 23, 1982. This sentence was automatically appealed to the Pennsylvania Supreme Court in accordance with 42 Pa.C.S.A. 9711(h):

"(h) Review of death sentence. -

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the cir-

> cumstances of the crime and the character and record of the defendant."

The Pennsylvania Supreme Court affirmed the sentence of death. (See Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983). In view of the allegations in defendant's Post Conviction Petition, it is important to appreciate the type of review conducted by the Pennsylvania Supreme Court. An affirmation of the judgment in the lower court is tantamount to a declaration that the defendant received a fair and error-free trial and that the sentence was not disproportionate or excessive. It is also significant that the decision of the Pennsylvania Supreme Court was appealed to the United States Supreme Court and certiorari was denied.

The defendant in his petition contends that his requested relief

should be granted because of --

> "The abridgment of a right guaranteed by the constitution or laws of this state or by the constitution or laws of the United States, including a right that was not recognized as existing at the time of the trial if the constitution requires retrospective application of that right."
> (Paragraph 4, page 2 of Post Conviction Petition).

In paragraph 5 on pages 3 and 3(a) of said petition, the defendant sets forth the following alleged facts as the basis for his requested relief (these alleged facts will hereinafter be referred to as ISSUES).

> "1. At the conclusion of my penalty trial, the Judge instructed the jury that they should not consider their sympathy for the defendant in deciding whether the death penalty should be imposed. (N.T. 1706).
>
> 2. During my penalty trial, the prosecution introduced evidence of

my guilty plea to second degree murder entered in Indiana County on May 19, 1980. Prior to the entry of that plea I was informed by my attorney, John H. Armstrong, that my plea of guilty would not be admitted at my capital trial in Westmoreland County. The Commonwealth of Pennsylvania reneged on the terms of my plea bargain and thereby violated my due process rights.

3. My rights under the Cruel and Unusual Punishment Clause were violated by the trial Court and each appellate Court thereafter.

4. The Courts have ignored and failed to address my claim that the sentence of death imposed on me was a disproportionate penalty for one found guilty of being an accomplice to a crime committed by another man, where it has not been shown that the

accomplice either intended or caused the death of the victim. My sentence of death has never been reviewed with regard to its disproportionate nature or the fact that it was imposed on the basis of prejudice and inflammatory evidence admitted at the trial in violation of my constitutional rights to a fair trial.

5. The sentence of death imposed on me was a product of passion and prejudice, and this issue has never been addressed by any Court reviewing this case to date.

6. My Constitutional rights have been violated by the refusal of the Courts to provide me with my own transcript of the trial and related proceedings."

In response to defendant's petition, this Court scheduled and held an evi-

dentiary hearing on January 28, 1985.

DISCUSSION AND CONCLUSIONS:

This defendant seeks to have his death sentence vacated through a Post Conviction Hearing Act proceeding. The "Post Conviction Hearing Act" is found in 42 Pa.C.S.A. § 9541 et seq. This legislation defines the permissible issues in a Post Conviction Hearing Act proceeding. The issues that may be considered under this Act are limited to those which have not been finally litigated or waived. Section 2 of said Act (42 Pa.C.S.A. § 9544) excludes issues which have been finally litigated or waived. This Section provides the following:

> "§9544. When an issue is finally litigated or waived
>
> (a) Issues finally litigated.-For the purpose of this subchapter, an issue is finally litigated if:

(1) It has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to appeal the trial court's ruling.

(2) The Superior Court has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to avail himself of further appeals.

(3) The Supreme Court has ruled on the merits of the issue.

(b) Issues waived.-For the purposes of this subchapter, an issue is waived if:

(1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.

(2) The petitioner is unable to prove the existence of extraordinary cir-

cumstances to justify his failure to raise the issue.

(c) Presumption.-There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure."(Emphasis supplied.)

The defendant has the burden of proving that the issues that he raises in the Post Conviction Petition have not been finally litigated and, if the issues have not been raised on appeal, he is obliged to prove the existence of extraordinary circumstances to justify his failure in raising these issues. The burden of establishing the grounds upon which post conviction relief is granted rests upon the person seeking that relief. (See Commonwealth v. Fox, 272 Pa.Super. 8, 414 A.2d 642; Commonwealth v. Logan, 464 Pa. 423, 424, 364 A.2d 266).

On January 28, 1985 this Court held an evidentiary hearing on defendant's

Post Conviction Petition. Counsel for the defendant proposed to call John Armstrong, Esq. Attorney Armstrong represented the defendant in Indiana County. The defendant was scheduled for a murder trial in Indiana County which was to be tried prior to a murder trial in Westmoreland County. (The murder trial in Westmoreland County is the subject of these proceedings.) Prior to the commencement of the trial in Indiana County, the defendant entered a plea of guilty second degree murder and the other charges against John Lesko in Indiana County were nolle prossed. The proffered testimony at this evidentiary hearing endeavored to explain the terms of the Indiana County guilty plea. Attorney John Armstrong was going to testify that the terms of the guilty plea were that the defendant would plead guilty to second degree murder; however,

the sentence of life imprisonmment would not be imposed until after the trial in Westmoreland County so that the Indiana County conviction would not be used in the Westmoreland County trial as an aggravating circumstance.

This Court sustained the Commonwealth's objection to the proffered testimony for the reason that it was irrelevant to this evidentiary hearing. If the proffered testimony had any relevancy it was in Indiana County, in a motion to withdraw the defendant's guilty plea. Secondly, Commonwealth's objection was sustained because the proffered testimony related to an issue which had been finally litigated; thus, excluded as a viable issue in a Post Conviction Hearing Act proceeding. The propriety of the guilty plea in Indiana County had been affirmed and sustained by the Pennsylvania Supreme Court. (See

Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983)). The Pennsylvania Supreme Court also sustained and affirmed the use of the Indiana County guilty plea as an aggravating circumstance in the Westmoreland County trial. (See Commonwealth v. Travaglia, supra.) The merits of this issue will more fully be addressed in another part of this Opinion.

The first ISSUE, as expressed in defendant's petition, is dismissed for two reasons. First, the defendant did not "prove the existence of extraordinary circumstances to justify his failure to raise the issue." Secondly, this ISSUE must be dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court impliedly affirmed the trial court's position on this ISSUE when it approvingly referred to the trial

judge's reference to the factor of sympathy in his charge to the jury.

> ["This, in fact, was the essence of the trial court's instruction--that sympathy was not a factor to be considered in the jury's deliberations, that there was sympathy on both sides of the case. (N.T. p. 1706). This was not an improper argument for the prosecutor to have made."
>
> Commonwealth v. Travaglia, supra, p. 301.

The defendant's factual averment in defendant's ISSUE NO. 1 represents only a portion of the court's charge on the consideration of sympathy. The trial court informed the jury that they should not consider sympathy for or against the defendant. The trial judge, in presenting this charge to the jury, is saying that the jury should not consider the sympathy for the defendant nor the sympathy for the deceased victim. The relevant portion of the trial judge's

charge is as follows:

> "Now, the verdict is for you, members of the jury. Remember and consider all of the evidence, giving it the weight to which you deem it is entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision--into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance."
> (N.T. p. 1706).

For the above-mentioned reasons, defendant's ISSUE NO. 1 has no merit and is dismissed.

ISSUE NO. 2 is dismissed because "the Supreme Court has ruled on the merits of the issue." (Furthermore, the United States Supreme Court has denied a writ of certiorari). The Pennsylvania Supreme Court in its majority opinion held that it was proper to use the defendant's Indiana County guilty plea as

an aggravating circumstance in the Westmoreland County homicide trial. Justice Nix's concurring opinion was primarily directed to this issue. This concurring opinion differed with the majority opinion in that Justice Nix felt the execution of the death sentence should be stayed until the Indiana County plea of guilty would be reviewed and affirmed by the Pennsylvania Supreme Court. Because the defendant's appeal of the Indiana County plea of guilty was considered by the Pennsylvania Supreme Court and the sentence was affirmed, Justice Nix was satisfied that this issue was no longer viable and could not affect the death sentence in the case at bar. Justice Nix's concurring opinion set forth the following:

> "Appellant Lesko initially filed a motion to withdraw his guilty plea in the Indiana County case on December 3, 1980, prior to the trial in Westmoreland Coun-

> ty, and filed an amended motion to withdraw on April 13, 1981. His motion, as amended, was denied on June 5, 1981. Lesko's challenge to that denial was rejected, and he was sentenced on July 17, 1981 to a term of life imprisonment. Lesko appealed to the Superior Court, which transferred the appeal to this Court. In Commonwealth v. Lesko, ____Pa.____, 467 A.2d 307 (1983), this Court affirmed the judgment of sentence. Thus as to Lesko my concern expressed here is satisfied."
>
> Commonwealth v. Travaglia, supra, p. 305, at n.2.

ISSUE NO. 2 is dismissed for the reason that it has been finally litigated by the Pennsylvania Supreme Court. (See Commonwealth v. Lesko, supra and Commonwealth v. Travaglia, supra.

The averments in ISSUE NO. 3 are vague. ISSUE NO. 3 impliedly contends that the death penalty violates the constitutional prohibition against cruel and unusual punishment. This issue is

dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court in the case of Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied sub nom. Zettlemoyer v. Pennsylvania, __ U.S.___, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), has held that capital punishment does not inevitably violate the prohibition of the Eighth Amendment against cruel and unusual punishment.

For the above-mentioned reason, ISSUE NO. 3 has no merit and is dismissed.

The defendant's ISSUE NO. 4 is dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court in its review of this case has conducted a "Proportionality Review" of the death sentence

as imposed upon this defendant:

> "We have searched the records of these cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed in these similar cases."
>
> Commonwealth v. Travaglia, supra, p. 304.

Contrary to the averments in ISSUE NO. 4, the jury did find that defendant John Lesko was an accomplice of Michael Travaglia and intended to cause the death of the victim. The trial judge, after correctly defining accomplice, explained the limited circumstances under which the defendant John Lesko could be equally guilty and equally responsible as the actual perpetrator of the criminal act. The following is the trial judge's charge on an accomplice's

criminal responsibility. It is a correct expression of the law.

> "Now, in this trial no evidence was presented to show or indicate that the defendant, John Lesko, shot the victim, Leonard Clifford Miller; the evidence, as presented, indicates that it was the defendant, Michael Travaglia, who shot the victim. Even though John Lesko did not do the shooting, it is possible to find him guilty of the same degree of homicide, criminal homicide, as Michael Travaglia, that is, if you will find Michael Travaglia guilty of any degree of criminal homicide. You could find John Lesko guilty only if you find John Lesko was an accomplice of Michael

Travaglia. It is possible to find a defendant guilty of a crime without finding that he personally performed the acts required for the commission of that crime. A defendant is guilty of a crime if he is an accomplice of the other person who commits that crime. He is an accomplice if, with the intent of promoting or facilitating the commission of the crime, he encourages, aids or assists such other person in committing the crime.

"Now, the mere presence at the scene of the crime is not sufficient to find a defendant to be an accomplice. Mere knowledge that another proposes to do an unlawful act is not

sufficient to constitute a conspiracy.

"Before you find such defendant to be an accomplice, you must find that the defendant shared the criminal intent of the active perpetrator and encouraged or assisted him or engaged in comparable overt acts. Therefore, if, under the rules of law that I have just given to you, you find that John Lesko was an accomplice and if you find Michael Travaglia was guilty of some degree of homicide, then you could find John Lesko guilty of the same degree of homicide."

(N.T. p. 1276, 1277.)

Based upon the trial judge's instructions and the evidence presented

during the trial, especially the testimony of Richard Rutherford, the jury found defendant, John Lesko, to be an accomplice, who shared the criminal intent of the active perpetrator and encouraged or assisted him or engaged in comparable overt acts.

ISSUE NO. 4's reference to "prejudice and inflammatory evidence" presumably refers to the testimony about the killing of William Nicholls. The Pennsylvania Supreme Court has ruled on the merits of this issue. (See Commonwealth v. Travaglia, supra.) This evidence unquestionably prejudiced the defendant--that's how defendants get convicted. To some extent this evidence was inflammatory; however, the Pennsylvania Supreme Court and the trial judge held that the evidentiary or probative value of this evidence greatly outweighed any possible prejudice.

For the above reasons, ISSUE NO. 4 has no merit and is dismissed.

ISSUE NO. 5 is dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court in its Opinion in Commonwealth v. Travaglia, supra, stated, "We also find...that the sentences were not 'the product of passion, prejudice or any other arbitrary factor.'" For this reason defendant's ISSUE NO. 5 has no merit and is dismissed.

ISSUE NO. 6 is dismissed. It has no relevancy to the relief requested in defendant's petition. The County of Westmoreland has paid for defendant's attorneys and all legal expenses relating to the trial and the appeals. Westmoreland County has supplied defendant's counsel with a copy of the trial transcript and all relevant and related records. Westmoreland County has also supplied each

Justice of the Pennsylvania Supreme Court with a copy of the complete record. This satisfies the County's responsibility. The County has the responsibility to provide the defendant "with copies of the necessary proceedings so that appellate rights might be actively pursued." (See Commonwealth v. Ballem, 482 A.2d 1322, 1323, n.1 (1984). Westmoreland County has fulfilled its responsibility.

For these reasons, defendant's ISSUE NO. 6 has no merit and is dismissed.

After hearing, and careful consideration of the defendant's Petition, this Court finds that the ISSUES raised by defendant's Petition have no merit and, therefore, cannot serve as the basis for the relief requested.

The Court enters the following Order:

Dated: June 11, 1985.

IN THE COURT OF COMMON PLEAS
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION
NO. 681 C 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

ORDER

AND NOW, to-wit, this 11th day of June, 1985, after hearing and review of defendant's Petition Under Post Conviction Hearing Act, the relief requested by defendant is DENIED.

BY THE COURT:

s/ Gilfert M. Mihalich ,J.
GILFERT M. MIHALICH, JUDGE

APPENDIX L

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

JOHN CHARLES LESKO,
Appellant

No. 41 W.D. Appeal Docket, 1982

Supreme Court of Pennsylvania.

Argued March 10, 1983

Decided September 29, 1983

Before ROBERTS, C.J., and NIX, LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON and ZAPPALA, JJ.

OPINION

ZAPPALA, Justice.

It is undisputed that on May 19, 1980, the Appellant John Charles Lesko pled guilty to murder in the second degree for the killing of William C. Nicholls. This plea was entered into on the day the matter was set for jury trial, after a brief discussion between the attorney for the Appellant and the

Indiana County District Attorney. It appears from the record that in return for the Appellant's plea of guilty to a charge of murder in the second degree, the Commonwealth dismissed the remaining charges of murder, complicity to commit murder, robbery and theft. Furthermore, the Commonwealth would not pursue sentencing of the Appellant until as least June 2, 1981 or later. Thereafter, on or about December 1, 1980, the Appellant filed a motion to withdraw his guilty plea.

In support of his motion, the Appellant alleged that given time for reflection, he wished to exercise his constitutional right of a trial by jury. This motion was subsequently amended on or about April 13, 1981 to allege that the Appellant was motivated to plead guilty "as a result of his illegal arrest and subsequent confession" (R. 26). Fur-

thermore, he indicated that an element of the plea arrangement was that his plea in this case could not be used in his Westmoreland County trial.[1] Since the District Attorney of Indiana County testified in the trial in Westmoreland County notwithstanding the Appellant's understanding of the plea agreement, the Appellant wished to withdraw his guilty plea. After taking testimony, reviewing briefs and the record, the learned trial judge dismissed the motion on or about June 5, 1981. Thereafter, the Appellant was sentenced to life imprisonment on the second degree murder charge. The Appellant filed an appeal to the Superior Court, which subsequently transferred the matter sua sponte to this Court. On appeal, the Appellant raised

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[1]The case in Westmoreland County was Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288.

for the first time the issue of the ineffectiveness of trial counsel. Even though no hearing has been conducted regarding this issue, we have assumed jurisdiction of this issue for the sake of judicial economy. Furthermore, remanding for an evidentiary hearing would not assist us in the disposition of this appeal.

In the lower court opinion, the trial judge found that "the evidence established: that the defendant entered his plea of guilty to second degree murder upon agreement of the Commonwealth to delay sentencing as a deliberrate choice of trial strategy in an effort to prevent evidence of his criminal acts in Indiana County from being considered as an aggravating circumstance during his first degree murder trial for killing a Westmoreland County police officer." (R. 51). The Appellant agrees with this

finding and now argues that his trial counsel was ineffective for persuading him to plead guilty in that trial counsel's conception of the use of this plea in the Westmoreland County case was in error.[2] Because it appears that the action of the Appellant's trial counsel was a calculated attempt to avoid the use of any Indiana County conviction in the Westmoreland County case as an aggravating circumstance, trial counsel cannot be deemed to be ineffective.

In Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349

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[2]The Appellant argues that trial counsel was ineffective because he failed to correctly interpret "conviction" as used in the Sentencing Code, the Act of September 13, 1978, P.L. 756 No. 141 § 1, as amended 1980, October 5, P.L. 693 No. 142 § 401(a). This issue is discussed in the related case of Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288 (1983).

(1967), Mr. Justice Roberts, now Chief Justice, cogently discussed the issue of ineffectiveness of trial counsel. Initially, trial counsel is presumed to be competent, and his allegedineffective actions must be evaluated to determine whether the strategy chosen is founded upon a reasonable basis designed to further his cleint's interests. We recently reaffirmed this test for determining ineffectiveness of trial counsel.

> The test of constitutional effective assistance of counsel is whether a particular course chosen by counsel has some reasonable basis designed to effectuate its client's interest. (Citations omitted) (Emphasis in original). The initial factor that is considered in applying this standard is whether the matters counsel is charged with failing to pursue had arguable merit. (Citations omitted).

Commonwealth v. Wade, 501 Pa. 331, 461 A.2d 613 (1983). See also Commonwealth v. Upsher, 497 Pa. 621, 444 A.2d 90

(1982); Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977).

This rule is founded upon the inequity of finding trial counsel ineffective for pursuing a strategy which at the time appeared to be in his client's best interest. It is grossly unfair to characterize trial counsel as ineffective when his strategy was formulated without the luxury of knowing the result of the chosen strategy. It is much easier to fault counsel on his chosen strategy after reviewing all the evidence and observing how the witnesses withstood the rigors of crossexamination. Therefore, in reviewing trial counsel's strategy, we must place ourselves in the position of trial counsel at the time the strategy was formulated to determine if the alternatives chosen were reasonable.

The Appellant contends that his trial counsel was ineffective for advising him to plead guilty to second degree murder in Indiana County with a delay in sentencing to avoid such conviction being considered as an aggravating circumstance in the penalty phase of the Westmoreland County case. Rather than deeming trial counsel's actions ineffective, we find it was a reasonable attempt to prevent an almost certainty from occurring. If the Appellant had been tried on May 19, 1980 as scheduled, there is no question that the prosecutor could have offered sufficient evidence to warrant a guilty verdict. This is clear from a. review of the guilty plea colloquy. Thus, a conviction and sentencing would have occurred prior to the trial in Westmoreland County. Accordingly, under any interpretation of § 9711(d)(10) of the Sentencing Code, 42

Pa.C.S.A. § 9711(d)(10), the Appellant's conviction would be admissible in the Westmoreland County case as an aggravating circumstance. Trial counsel attempted to avoid this certainty by preventing sentencing until the Westmoreland County case was completed. It was hoped that by following this course, the Westmoreland County judge would disallow the Indiana County guilty plea from being introduced in the penal phase of the trial as an aggravating circumstance, because no sentence had been imposed in Indiana County. However, the Westmoreland County trial judge correctly determined that the plea was admissible.[3] Although trial counsel's strategy failed, he cannot be deemed ineffective. Having determined that

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[3]Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288 (1983).

trial counsel's actions were reasonable and designed to protect the Appellant's interests, it is clear that these actions cannot be deemed ineffective.

Finally, the Appellant asserts that the lower court erred in refusing to allow him to withdraw his guilty plea. The Appellant argues that the lower court applied an incorrect standard in determining whether to permit the Appellant to withdraw his guilty plea.

In Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973), we held that the proper standard to be used for permitting a defendant to withdraw his guilty plea prior to sentencing is whether a fair and just reason exists. If the trial court finds any fair and just reason for the withdrawal, such withdrawal should be permitted because of the importance of an accused's rights

to a trial by his peers. However, once a sentence has been imposed, an accused should be permitted to withdraw his guilty plea only "to correct a manifest injustice." Commonwealth v. Starr, 450 Pa. 485, 301 A.2d 592 (1973). The basis for the difference between these two standards is clear. Allowing an accused to withdraw his guilty plea after imposition of sentence requires a stricter standard to prevent defendants from using a guilty plea as a tool for previewing the sentencing by the court. Such a misuse does not occur when withdrawing a guilty plea prior to sentencing.

The lower court applied the "manifest injustice" standard, reasoning that the Appellant was pre-advised of the only possible sentence. Therefore, the Appellant's petition was akin to a post-sentencing petition. Because the Appel-

lant was well aware of the only sentence imposable for the crime to which he pled guilty, we find no error in applying the "manifest injustice" standard. In any event, applying the "fair and just reason" standard will not give the Appellant the requested relief.

The reasons offered by the Appellant in support of his motion to withdraw his guilty plea were that his guilty plea was motivated by an illegal arrest and subsequent confession[4] and that the Indiana County District Attorney breached the plea bargain agreement by testifying in the Appellant's Westmoreland County trial. The Appellant argues that by the terms of the agreement, the

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[4]The Appellant's argument that the guilty plea was motivated "as a result of his illegal arrest and subsequent confession" is also without merit for the reasons set forth in the related appeal cited at 502 Pa. 474, 467 A.2d 288 (1983).

Indiana County conviction could not be used in his Westmoreland County trial. We have reviewed the record and find no such agreement. The agreement provided that sentence not be imposed until sentence not be imposed until June 2 or later. At no time did the District Attorney agree not to testify in Westmoreland County and only did so in lieu of being subpoenaed. Therefore, the plea bargain agreement was not breached.

For the foregoing reasons, it is clear that the lower court did not abuse its discretion in not allowing the Appellant to withdraw his guilty plea.

Judgment affirmed.